JAYA HARTA REALTY SDN BHD

v.

KOPERASI KEMAJUAN PEKERJA-PEKERJA LADANG BHD

HIGH COURT MALAYA, ALOR SETAR
HISHAMUDIN YUNUS J
[CIVIL SUIT NO. 22-20-95]
13 APRIL 2000

CIVIL PROCEDURE: *Appearance - Non-appearance by garnishee - Not informed of hearing date - Change of solicitors by plaintiff - Whether new solicitors under a duty to inform - Whether former solicitors under a duty to inform - Whether garnishee at fault for not inquiring*

LEGAL PROFESSION: *Duty of care - Duty to opposite party - Duty of former solicitors and new solicitors to inform hearing date - Duty of new solicitors to inquire whether garnishee informed - Whether new solicitors negligent in proceeding with hearing*

The garnishee was absent on the day of the hearing of the garnishee proceedings and the garnishment order was made against it. The garnishee applied to the senior assistant registrar to set aside the order on grounds that it was absent from the proceedings as it was not informed of the hearing date. The senior assistant registrar dismissed its application and hence this appeal.

The garnishee had requested the former solicitors of the plaintiff, on 26 December 1996, to obtain the hearing date of the garnishee proceedings from court and to revert back to it. The former solicitors obtained the date for hearing, which was 21 January 1997, but failed to revert back to the garnishee.

In the meantime the plaintiff changed its solicitors. The new solicitors filed a notice of change of solicitors on 18 November and served the notice on 10 January 1997 on the former solicitors and faxed the notice to the garnishee on 20 January 1997.

At the hearing on 21 January 1997 the garnishee, unaware, was absent and the plaintiff obtained the garnishment order.

The former solicitors submitted that they had not informed the date of the hearing to the garnishee as they had ceased to be the solicitors for the plaintiff from 18 November 1996 and it was the duty of the new solicitors to inform the garnishee of the date of the hearing.

The new solicitors claimed that it was not their duty to inform the garnishee but the former solicitors' duty and added that it was also the duty of the garnishee to inquire about the date either from the former solicitors or the court.

Held:

[1a] It is the duty of both the former solicitor and the new/current solicitor of the plaintiff to inform the garnishee of the date of the hearing of the garnishing proceeding.

[1b] Until 19 January 1997 it was the duty of the plaintiff's former solicitors to so inform the garnishee. This is in light of the former solicitors' agreement upon the request by the garnishee to mention on its behalf and to revert to the garnishee.

[1c] On 20 January it was then the duty of the plaintiff's new solicitors to inform the garnishee of the new date. Following the inference that the new solicitors had knowledge of the arrangement they had a professional duty to inquire from the former solicitors as to whether or not the latter had already informed the garnishee of the hearing date. It was unethical and unlawful for the new solicitors to have proceeded with the hearing on 21 January in the absence of the garnishee without first having ascertained from the former solicitors whether or not the garnishee had been informed of the hearing date.

[2] The garnishee's failure to appear in court was not deliberate and neither was the garnishee negligent for not inquiring about the date of the hearing from the former solicitors or from the court. This was because, firstly, it was not aware of the filing of the notice of change of solicitor until 20 January 1997, and secondly, it had by letter requested the former plaintiff's solicitor to mention on its behalf and then to revert back to it. Thirdly, this was not the first time such a request had been made by the garnishee and at all former times the former plaintiff's solicitors had mentioned on behalf of the garnishee and had never failed to revert back to the garnishee the hearing date. Finally the date of the hearing was only about three weeks away from the last mention date. Considering the relatively short period and the reasonable expectation on the part of the garnishee that the former solicitors would revert back to it, it would be harsh and unjust to penalise the garnishee for not making inquiries during the three-week period.

Per curiam:

[1] Order 64 r. 1(3) Rules of the High Court 1980 dictates that the notice of change in solicitor must be served on 'every other party' and this provision read with s. 38 of the Interpretation and General Clauses Ordinance 1948 makes it clear that the notice must be served with all convenient speed or as soon as possible. Thus it was a breach of the procedural rules for the plaintiff to serve the notice on the former solicitors some one month and three weeks later; and on the garnishee not only more than two months later but just one day before the hearing. Furthermore, service of the notice of change of solicitor should not have been effected merely by way of fax but must be in accordance with one of the modes of service as prescribed by O. 62 r. 6(1) Rules of the High Court 1980. Therefore, there had been no service of the notice of change of solicitor on the garnishee and it follows that the new solicitors had no *locus standi* to appear on behalf of the plaintiff. As a matter of law the new solicitors could not act on behalf of the plaintiff until all the parties in the proceedings had been served with the notice.

[Appeal allowed with costs.]

Legislation referred to:
Interpretation and General Clauses Ordinance 1948, s. 38
Rules of the High Court 1980, O. 62 r. 6(1), O. 64 r. 1(1), (3)

For the appellant - Steven Pung
For the respondent - Edwin Seibel; M/s Kas & Co

Reported by Sherin Kunhibava

JUDGMENT

Hishamudin Yunus J:

Enclosure (61) is an appeal to the judge in chambers by the appellant/ garnishee, a firm of solicitor known as Messrs Isharidah, Ho, Chong & Menon, against the decision of the learned senior assistant registrar made on 20 October 1997 in respect of encl. (27).

Enclosure (27) was an application before the senior assistant registrar to set aside a garnishment order made against the garnishee on 21 January 1997 in their absence.

The reason why the appellant/garnishee had applied to the senior assistant registrar to set aside his order was because they (ie, the appellant/garnishee) was not informed of the hearing date (ie, 21 January 1997) and was thus absent on the hearing day. In other words they were not given the opportunity to be heard.

On 20 October 1997 the senior assistant registrar heard the application to set aside (ie, encl. (27)) and dismissed it. Hence, this appeal.

I allowed the appeal because, in my judgement, there is merit in the application before the senior assistant registrar to set aside his order made on 21 January.

I am of the view that the appellant/garnishee have given a plausible explanation as to why they were absent on the day of the hearing. The learned senior assistant registrar should have accepted the explanation.

First, I shall proceed to touch on the background. When the matter regarding the show cause was supposed to come up for mention on 31 December 1996 before the learned senior assistant registrar, the appellant/garnishee had wrote on 26 December 1996 (exh. PM4 of encl. 28) and requested the former solicitor for the plaintiff, Messrs Awtar, Ghazali, Augustine & Co., who would be attending the court on that day, to mention on their (ie, the garnishee's) behalf, to get the hearing date and revert to them (ie, Messrs Isharidah). Messrs Awtar agreed. A counsel from Messrs Awtar was present before the registrar on the mention date and, accordingly, obtained the date of the hearing of the garnishee proceeding. The date given by the senior assistant registrar for the hearing was 21 January 1997. However, Messrs Awtar never reverted to the appellant/garnishee to inform them of the date of the hearing. Thus the appellant/garnishee was not aware of the hearing date.

Now, subsequent to 31 December 1996, the plaintiff decided to change their solicitor from Messrs Awtar to Messrs Kas & Co., ie, the present solicitor. Accordingly, on 18 November 1999, Messrs Kas & Co. filed a notice of change of solicitor, notifying that they were taking over the matter from Messrs Awtar as solicitor for the plaintiff. The notice of change of solicitor was served on Messrs Awtar on 10 January 1997 but was never served on the appellant/garnishee. However, the notice was faxed by Messrs Kas to the garnishee on 20 January 1997 (strictly, the service of the notice on the appellant/garnishee should not have been by way of fax but should have been in accordance with O. 62 r. 6 of the Rules of the High Court 1980 ("the RHC") – I shall say more of this later). However, neither Messrs Awtar nor Messrs Kas informed Messrs Isharidah (the appellant/garnishee)

of the date of the hearing (21 January 1997). As I have said, Messrs Isharidah was not aware of the date of the hearing and so they, as the garnishee, were not present before the senior assistant registrar on 21 January 1997 to show cause.

At the hearing on 21 January 1997, the plaintiff obtained the garnishment order against the appellant/garnishee. The latter came to know about the hearing only after they were served with the order (which the plaintiff had obtained on 21 January in the absence of the appellant/garnishee) on 22 January 1997 by the plaintiff's new solicitor, Messrs Kas.

On the same day, the appellant/garnishee phoned Messrs Awtar to inquire and was informed that they (ie, Messrs Awtar) were the solicitor for the plaintiff only until 1 January 1997. Dissatisfied, the garnishee wrote to Messrs Awtar to inquire as to why they were not informed of the hearing date. Messrs Awtar replied that they had ceased to be the solicitor for the plaintiff with effect from 18 November 1996, and added that it was the duty of the new solicitor for the plaintiff, that is to say, Messrs Kas, to inform the appellant of the date of the hearing.

The garnishee also wrote and inquired from Messrs Kas as to why they were not informed of the date of the hearing. Messrs Kas replied that it was not their duty but that of the former solicitor of the plaintiff ie, Messrs Awtar to inform the appellant/garnishee of the date; and added that it was also the duty of the garnishee to inquire about the date either from Messrs Awtar or from the court.

In my judgement, it is the duty of both the former solicitor (Messrs Awtar) and the new/current solicitor (Messrs Kas) of the plaintiff to inform the garnishee of the date of the hearing of the garnishee proceeding. These two firms could not blame one another. Both had failed to honour their obligation towards the appellant/garnishee. Until 19 January 1997, it was the duty of the former plaintiff's solicitor (Messrs Awtar) to so inform the garnishee. This is in the light of the appellant's/garnishee's letter of 26 December 1996 (that I have referred to earlier) to Messrs Awtar and the latter agreeing to mention on their behalf and to revert to the appellant/garnishee. Thus, Messrs Awtar is partly to be blamed.

However, on 20 January, when the change of solicitor became effective (however, see O. 64 r. 1(1) and (3) – I shall discuss more of this later), it was then the duty of the plaintiff's new solicitor, Messrs Kas & Co., to inform the appellant/garnishee of the new date. In my judgment the inference can fairly be made that Messrs Kas have had knowledge of the arrangement regarding the date of the hearing between Messrs Isharidah

and Messrs Awtar. It is, however, open to Messrs Kas to rebut such an inference. But the fact is that they have not done so. Neither the plaintiff nor their present solicitor have, in the several affidavits filed, forthrightly stated that Messrs Kas was not aware of Messrs Awtar's obligation to inform the garnishee of the date of the hearing. On the other hand, there is the letter of Messrs Awtar to the garnishee dated 29 January 1997 (exh. PM9 of encl. 28) the contents of which strongly implied that Messrs Kas had knowledge of the arrangement. The relevant portion of the letter reads:

> Kindly be informed that as 2/1/97 we have ceased to act for M/S Jaya Harta Realty Sdn. Bhd. (A copy of a letter from Jaya Harta Realty Sdn. Bhd. is enclosed herewith for your reference).
>
> Further on 10/1/97 we were served a copy of the Notice of change of solicitors by Messrs Kas 7 Co., and from the look of the Notice of change of solicitors we have ceased to act for M/s Jaya Harta from 18th November, 1996.
>
> Further be informed that only upon our instructions Messrs Kas & Co. served a copy of the Notis Penukaran Peguamcara on your goodselves and in view of the above facts, it was the duty of M/S Kas & Co. to inform your goodselves of the new hearing date which they could have done when they served your goodself a copy of the Notis Penukaran Peguamcara.

Further, there is affidavit evidence that Messrs Kas had made a file search at the Alor Setar High Court and also had knowledge of the hearing date of 21 January 1997. These facts further strengthen the inference of having had knowledge. In my judgement, Messrs Kas, before participating in the hearing on 21 January, as the solicitor for the plaintiff, having had knowledge of the arrangement had a professional duty to inquire from Messrs Awtar as to whether or not the latter had already informed the garnishee of the date; and to act accordingly as a professional. Being the solicitor taking over, Messrs Kas must assume the obligation that subsisted between Messrs Awtar and Messrs Isharidah. With respect, I think it was morally and legally wrong for Messrs Kas to adopt the attitude, as they had done in the present case, that they had nothing to do with Messrs Awtar's obligation to revert to the garnishee. It was unethical and unlawful for Messrs Kas to have proceeded with the hearing on 21 January in the absence of the appellant/garnishee without first having ascertained from Messrs Awtar whether or not the garnishee had been informed of the hearing date.

I must remark here that I am rather perturbed to note that although the notice of change of solicitor was filed on 18 November 1996, it was served on the former plaintiff's solicitor only on 10 January 1997, and more appalling, it was never served on the garnishee as required by O. 64 r. 1(1) and (3) of the RHC. The provisions stipulate:

> 1. **Notice of change of solicitor**
>
> (1) A party to any cause or matter who sues or defends by a solicitor may change his solicitor without an order for that purpose but, unless and until notice of the change is filed and **served in accordance with this rule**, the former solicitor shall, subject to rules 4 and 5, be considered the solicitor of the party until the final conclusion of the cause or matter, in the High Court. (emphasis added)
>
> (2) ...
>
> (3) The party giving notice must serve on **every other party** to the cause or matter (not being a party in default as to entry of appearance) and on the former solicitor a copy of the notice. (emphasis added)

It is clear to me that "every other party" includes the garnishee, Messrs Isharidah. The plaintiff's new solicitor merely faxed the notice to the garnishee and this was done only two months after the date of filing. Even then it was upon the "instruction" of Tetuan Awtar. In other words, it was faxed only on 20 January 1997, that is to say, just a day before the hearing of the garnishee proceeding. This long unexplained delay and eleventh hour action on the part of the plaintiffs' solicitor was unethical and constituted a breach of O. 64 r. 1(1) and (3) of the RHC. It is true that, although O. 64 r. 1(3) imposed a duty on the new solicitor to serve the notice of change on "every other party to the cause or matter", the provision does not stipulate the time. However, this r. 1(3) must be read with s. 38 of the Interpretation and General Clauses Ordinance 1948 which provides:

> 38. **Provision when no time prescribed.**
>
> Where no time is prescribed or allowed within which anything shall be done, such thing shall be done **with all convenient speed** and as often as the prescribed occasion arises. (emphasis added)

If so read, then it is clear that the notice must be served with all convenient speed or as soon as possible. Thus it was a breach of the procedural rules for the plaintiff to serve the notice on Messrs Awtar some one month and three weeks later; and on the garnishee not only more than two months later but just a day before the hearing date.

Another disquieting observation is that, as I have pointed out earlier, the service of the notice of change on the garnishee should not have been effected merely by way of a fax but must be in adcordande with one of the modes of service as prescribed by O. 62 r. 6(1) of the RHC which stipulates:

> 6. **Ordinary service: How effected.**
>
> (1) Service of any document, not being a document which by virtue of any provision of these rules is required to be served personally, may be effected:
>
> (a) by leaving the document at the proper address of the person to be served; or
>
> (b) by prepaid registered post; or
>
> (c) in such other manner as the Court may direct

Undoubtedly "service" by fax does not fall under any of the mode (a), (b) or (c) as prescribed above. Therefore, strictly speaking, there had been no service of the notice of change of solicitor on the garnishee and it follows that Messrs Kas had no *locus standi* to appear on behalf of the plaintiff on 21 January 1997. In other words, as a matter of law, Messrs Kas could not act on behalf of the plaintiff until all the parties in the proceeding have been served with the notice (and I refer again to O. 64 r. 1(1) and (3)).

It is a misconception to assume, as was assumed by Messrs Awtar and Messrs Kas in the instant case, that Messrs Awtar ceased to be the solicitor for the plaintiff the moment the notice was served on them (ie, Messrs Awtar) on 10 January. Service on Messrs Awtar alone was not sufficient for the purpose of O. 64 r. 1(1) and (3). The notice had to be served on every party to the proceeding for the change to be effective in law: and in the present case, there is another party (apart from the defendant, whom we are not concerned with at the moment) – the garnishee. In other words, strictly speaking, Messrs Awtar was still the solicitor for the plaintiff on the day of the hearing itself ie, 21 January.

However, at the hearing of this appeal before me, the garnishee did not raise any objection on the mode or time of the "service" of the notice of change on them, nor did the garnishee raise any objection on the capacity of the counsel from Messrs Kas to appear on behalf of the plaintiff on 21 January before the senior assistant registrar. Indeed, from the submissions and the affidavits of the garnishee it would appear that they seem to have accepted that they were duly served (albeit by way of fax)

with the notice on 20 January and that the counsel from Messrs Kas had the *locus standi* to appear before registrar on 21 January. In the circumstances, for the purpose of this appeal, I am impelled to proceed on the premise that the garnishee was properly and validly served with the notice of change of solicitor on 20 January and that the plaintiff was properly and legally represented before the registrar on the 21 January. In other words, all my aforesaid observations and comments must be regarded as nothing more but as mere passing remarks.

The plaintiff/respondent submitted that the garnishee was at fault because they did not inquire from either the former plaintiff's solicitor or from the court about the date of the hearing. With respect, I do not think that in the circumstances of the case the garnishee was in any way negligent or should be blamed. First, they were not aware of the filing of the notice of change of solicitor made on 18 November 1996. They became aware only on 20 January 1997. Second, they had by their letter of 26 December 1996 requested the former plaintiff's solicitor to mention on their behalf and then 'to revert to them ("Please revert to us in due course"), and Messrs Awtar, regrettably, had failed to discharge their professional obligation towards the garnishee. Third, it is important to note that that was not the first time that the garnishee had requested the former plaintiff's solicitor to mention on their behalf and to revert to them informing of the next date. They had made similar requests to Messrs Awtar on several occasions in the past. On the several occasions in the past, when Messrs Awtar had mentioned on behalf of the garnishee they had never failed to revert to the garnishee and to inform them of the new date. This can be seen upon a perusal of the correspondence between the garnishee and Messrs Awtar which are exhibited as exhs. PM2 to PM3 of encl. 28. Finally, the date of the hearing (21 January 1997) was only about three weeks away from the last mentioned date, ie, 31 December 1996. Considering the relatively short period and the reasonable expectation on the part of the garnishee that Messrs Awtar would revert to them, and that Messrs Awtar in the past had never failed to revert to them, to my mind, it would be harsh and unjust to penalise the garnishee for not making inquiries during the three-week period.

My conclusion is that the garnishee's failure to appear in court on 21 January 1997 was neither deliberate nor negligent, and therefore there should be a rehearing where they would have the opportunity of being heard. In addition, I would hold that the plaintiff should not be allowed to benefit from their solicitors' default.

Accordingly, I had allowed the appeal with costs by setting aside the order of the senior assistant registrar dated 21 January 1997. 1 had left the order to show cause dated 18 April 1995 unaffected and instead ordered that there should be a fresh hearing of the show cause. As a consequential relief, I also ordered that the money in question be returned to the garnishee until the determination of the garnishee proceeding.